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In The

Supreme Court of the United States

October Term, 1977

Record No. 77-889

PHYLLIS ANNE SMITH,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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OPINION BELOW

There is no reported Opinion of the Supreme Court of Virginia. The Order rejecting the Petition for Writ of Certiorari set forth in petitioner's Appendix.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Is it a denial of the equal protection of law or violation of due process of law or both for a Virginia state court to take the view that a husband can violate his estranged wife's property rights without impunity, thus denying her the right to defend her property from invasion by the husband?

2. Whether the instruction on the applicable Virginia statutes regarding the use of a firearm was a violation of the double jeopardy guarantee.

STATEMENT OF THE CASE

For thirteen years, the marital relationship between Fred and Phyllis Smith was replete with fights in which they heaped both physical and mental abuse on each other. In early July, 1976, the petitioner moved into an apartment. Her frequent guest in her new apartment was Wilson Vincent, a fellow employee. In fact, the relationship between the petitioner and Mr. Vincent became so intimate that he often stopped by her apartment to rest while he was in transit between his two jobs.

Mrs. Smith had a ten-year-old daughter who was exposed to this complicated relationship. At the time of this incident the petitioner had consented to allow her estranged husband to have custody of their daughter, at her daughter's request. Transcript 157.

On the afternoon of July 24, 1976 Fred Smith, the deceased, made several telephone calls to the apartment of the petitioner telling her of his love for her and requesting a reconciliation. On the last phone call the petitioner hung up on him. Within an hour of the last call the deceased went to petitioner's apartment.

When he arrived the petitioner was entertaining Mr. Vincent. In the heat of anger, the deceased and Mr. Vincent

got into a fight in which the deceased began choking Mr. Vincent. The deceased was not armed at any time.

While they were fighting, the petitioner got Mr. Vincent's gun from under the cushion of the sofa and fired two warning shots into the air. After the first shot, a neighbor came to her door and the petitioner asked the neighbor to summon help. Transcript 242.

During the time that the deceased was choking Mr. Vincent the petitioner did not fire any shots at the deceased or in his direction. As the deceased began to arise from the fight with Mr. Vincent, the petitioner shot him in the back. He had not turned around or made any advances in the direction of the petitioner. The petitioner then called an ambulance and went over to the deceased and felt for a pulse. Transcript 243.

When the police arrived, Mr. Vincent having regained consciousness and the petitioner were standing in the middle of the floor. At this time, she pointed to the deceased and told the policeman, "He's dead; I shot him." Transcript 41.

In conversation with her family on the day after the shooting, the petitioner told him she was glad to be rid of the deceased and that she was glad that she would not have to live any more like she had lived for the past thirteen years. Transcript 93.

ARGUMENT AGAINST THE GRANTING OF WRIT OF CERTIORARI

I.

Petitioner's Claims Are Not Properly Before This Court.

It was very early established that the United States Supreme Court would not decide federal constitutional issues raised in the Supreme Court for the first time on review of

state court decisions. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969). The rationale underlying this Court's policy of refusing to review issues raised for the first time in this Court is that in a federal system it is important that State courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, *Cardinale, supra,* and to assure that this Court would have an adequate record before it prior to rendering decisions of constitutional magnitude. *Hill* v. *California,* 401 U.S. 797 (1971). To the same effect see *Rugendorf* v. *United States,* 376 U.S. 528 (1964).

When a comparison is made of the issues raised in the Supreme Court of Virginia with all of those being raised in this Court, it becomes apparent that petitioner is raising issues for the first time. A review of the errors assigned and argument present to the Virginia Supreme Court clearly reveals that at no time was the Virginia Supreme Court called upon to determine whether the trial court's denial of the instructions offered violated the petitioner's right to equal protection of the law. Likewise, no contention of denial of equal protection was submitted by petitioner to the trial court below.

The Virginia Supreme Court has consistently held that it will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, and that only errors assigned will be ruled upon. Rule 5:21, Rules of the Supreme Court of Virginia; *Clarendon House* v. *Helfert,* 213 Va. 28, 189 S.E.2d 331 (1972); *Rice* v. *Commonwealth,* 212 Va. 778, 188 S.E.2d 196 (1972); *Manley* v. *Commonwealth,* 211 Va. 146, 176 S.E.2d 309 *cert. den.* 403 U.S. 936 (1970). See also *Wainwright* v. *Sykes,* ..... U.S. ....., 97 S.Ct. 2497 (1977).

In *Beck* v. *Washington,* 369 U.S. 541 (1962), the defendant claimed that the Washington statute permitting persons in custody to challenge grand jurors denied equal protection to persons not in custody who were investigated by grand juries. In refusing to rule upon the issue this Court held that "[t]his point is not properly before this Court. Although both opinions of the Washington Supreme Court discussed the interpretation of § 10.28.030, neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute." 369 U.S. at 549, 550.

The Commonwealth submits that the Virginia Supreme Court has never been called upon to determine the constitutional challenge. In petitioner's appeal to the Virginia Supreme Court no equal protection claim was raised. Consequently, an issue of constitutional dimension is not properly before this Court, and this Court should not exercise jurisdiction over such an issue when the Virginia Courts have not passed upon them and there is no adequate record before this Court upon which to decide the issues raised.

II.

Jury Instructions Are Matters Of State Law And Present No Substantial Federal Question.

The respondents submit that jury instructions are matters of state law and that unless a substantial federal question is presented, this Court should not entertain this Petition for Certiorari. A similar issue was raised in *Moore* v. *Illinois,* 408 U.S. 786, 799 (1972) concerning admissibility of evidence. This Court held in that case that admissibility of evidence was not subject to review by the federal court. Similarly, in the case at bar, the instructions to the jury are matters of state law which should not be the subject of review in

this Court. See also *Robinson* v. *California*, 370 U.S. 660, 669 (1972).

In *Cupp* v. *Naughten*, 414 U.S. 141 (1973), this Court considered an instruction used in Oregon dealing with credibility of witnesses and whether the instruction violated the defendant's right to remain silent. The Court held that:

> "[B]efore a federal court may overturn a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." 414 U.S. at 146.

The Court went on to say that the issue in such cases is "whether the aim of the instruction so infected the entire trial that the resulting conviction violates due process." 414 U.S. at 147. The respondent respectfully submits that the instructions given in this case were not violative of petitioner's rights, nor was the entire trial so infected that the conviction violated due process. Likewise the failure of the trial court to grant requested instructions did not infect the entire trial so as to violate due process. In *Henderson* v. *Kibbe*, ... U.S. ....., 97 S.Ct. ....., 52 L.Ed.2d 203 (1977) complaint was made that the Court failed to instruct the jury properly. The Court held

> "[A]ccordingly we reject the suggestion that the omission of more complete instructions on the causation issue 'so infected the entire trial that the resulting conviction violated due process.' Even if we were to make the unlikely assumption that the jury might have reached a different verdict pursuant to an additional instruction, that possibility is too speculative to justify the conclusion that constitutional error was committed." 52 L.Ed.2d at 214.

The respondent respectfully submits that whether the instructions given were erroneous, or the Court improperly denied valid instructions, that the petitioner's trial was not so infected as to violate due process.

III.

The Instructions Given Did Not Violate Petitioner's Right To Equal Protection Of Law.

The petitioner contends that she was entitled to an instruction:

> "The Court instructs the jury that justifiable homicide is a killing of a human being in the necessary or apparently necessary defense of oneself of close friends from great bodily harm, apparently intended to be committed by force or in defense of home, property, or person against one who apparently endeavors by violence or surprise to commit a felony or either."

The Court deleted certain parts and gave substantially that which was requested. In Virginia, instructions must be based upon the evidence. *Gibson* v. *Commonwealth*, 216 Va. 412, 219 S.E.2d 845, *cert. den.* 425 U.S. 994 (1975). In the case at bar, the petitioner got substantially what was requested in this instruction based upon her theory of the case. Moreover, the law in Virginia on the amount of force to be used in self-defense cases is set out in the case of *Bausel* v. *Commonwealth*, 165 Va. 669, 181 S.E. 453 (1905):

> "the owner [of a dwelling] may resist the entry [of another upon his dwelling], but has no right to kill, unless it is rendered necessary to prevent loss of life or great bodily harm. If he kills where there is not a reasonable ground of apprehension of an imminent danger to his person or property, it is manslaughter. . ." 165 Va. at 688.

The respondent submits that the facts do not support the refused Instructions 7, 16, and 18. The facts do not show that the petitioner was defending her home as requested in Instruction 7, nor was anyone attempting to commit a felony upon her as requested in Instruction 16, nor was anyone attempting to commit a felony upon her habitation as requested in Instruction 18. See *Fortune* v. *Commonwealth,* 133 Va. 669, 112 S.E. 861 (1922), and *Bailey* v. *Commonwealth,* 200 Va. 92, 104 S.E.2d 28 (1958).

The petitioner has argued that she was denied equal protection of the law because the Court held that the husband could act with impunity versus the wife's property and not be held accountable. The Court made no such holding. The Court only ruled with respect to the evidence presented which instructions it would allow. The Court denied the instructions because they were not warranted by the evidence presented.

IV.

A Conviction Of Manslaughter And Use Of A Firearm In The Commission Of A Felony Do Not Violate The Petitioner's Right Against Double Jeopardy.

It is the position of the petitioner that her conviction and sentences for both manslaughter and use of a firearm during the commission thereof are in violation of her Fifth Amendment right not to be "subject for the same offense to be put in jeopardy of life or limb." Amendment V, United States Constitution.

In Virginia and most states the standard for determining whether offenses are being "the same" is the "same evidence test" adopted by this Court in *Blockburger* v. *United States,* 284 U.S. 299 (1932). The test is that if each offense requires

proof of an element which the other does not, the offenses are not the same. It is also recognized that to support a claim of double jeopardy it must be shown that the offenses were the same in law *and* in fact. See *United States* v. *McCall,* 489 F.2d 359 (2nd Cir. 1973); *Kowalski* v. *Parratt,* 533 F.2d 1071 (8th Cir.) *cert. den.* 429 U.S. 844 (1976). In other words, the defendant may be convicted of two separate offenses arising from a single act or transaction as long as each offense requires proof of a fact which the other does not. *Pereira* v. *United States,* 347 U.S. 1 (1954); *Gavieres* v. *United States,* 220 U.S. 338 (1911).

In a similar case to the one at bar, *Jones* v. *Commonwealth,* 218 Va. 18, 235 S.E.2d 313 (1977), the Supreme Court of Virginia held that robbery by means of a firearm and use of a firearm in the commission of a felony were different crimes for purposes of double jeopardy. The Virginia Court in applying the "same evidence test" compared the elements of robbery in Virginia and the elements of use of a firearm to commit a felony and concluded as a matter of *law,* even though they may have common elements as a matter of fact, are separate and distinct offenses for double jeopardy purposes. The elements in the crime of robbery by use of a firearm are more similar to the crime of using a firearm in the commission of a felony than is manslaughter.

In Virginia "where death ensues on a sudden provocation, or a sudden quarrel, without malice prepense, the killing is manslaughter." *Clark* v. *Commonwealth,* 90 Va. 360, 368, 18 S.E. 440 (1893). See also *Moxley* v. *Commonwealth,* 195 Va. 151, 157, 77 S.E.2d 389 (1953), *Byrd* v. *Commonwealth,* 89 Va. 536, 16 S.E. 727 (1893). In order to be convicted of manslaughter no weapon need be used. The gist of manslaughter is killing in the heat of passion or sudden provocation. Use of a firearm in the commission of

a felony requires different proof for a conviction than does manslaughter.

Petitioner's contention is a familiar one in the realm of similar federal statutes. 18 U.S.C. § 924(c) concerns the use or carrying of firearms in the commission of a federal felony, and at least six Circuit Courts of Appeals have declared that it creates a crime separate and distinct from the underlying felony. *United States* v. *Howard,* 504 F.2d 1281 (8th Cir. 1974); *United States* v. *Ramirez,* 482 F.2d 807 (2d Cir.), *cert. den.* 414 U.S. 1070 (1973); *United States* v. *Crew,* 538 F.2d 575 (4th Cir.), *cert. den.* 429 U.S. 852 (1976); *Perkins* v. *United States,* 526 F.2d 688 (5th Cir. 1976); *United States* v. *Dixon,* 558 F.2d 919 (9th Cir. 1977); *United States* v. *Sudduth,* 457 F.2d 1198 (10th Cir. 1972).

Congressional intent to prevent the carrying and use of firearms in the commission of federal felonies was of prime importance to the court in *United States* v. *Sudduth, supra,* in deciding that 18 U.S.C. § 924(c) created a separate crime. It is beyond question that the intent of the General Assembly of Virginia was to create, by way of § 18.2-53.1 Code of Virginia (1950) as amended, a separate crime, the gist of which is the use of a firearm in situations where it is particularly likely that weapons may be used to injure victims, law enforcement officers or bystanders. The very terms of the statute make the intent clear: "Violation of this section [§ 18.2-53.1] shall constitute a separate and distinct felony."

More importantly, several courts have held that simultaneous convictions and sentences under 18 U.S.C. § 924(c) and the federal armed bank robbery statute, 18 U.S.C. § 2113(a, d) do not violate the double jeopardy clause of the Fifth Amendment. *United States* v. *Crew, supra; Perkins*

v. *United States, supra; United States* v. *Hearst,* 412 F. Supp. 877 (N.D. Cal. 1976); *United States* v. *Grant,* 549 F.2d 942 (4th Cir. 1976), *cert. den.* 53 L.Ed.2d 1081 (1977). By comparison of the elements of the crimes in 18 U.S.C. § 924(c) and 18 U.S.C. § 2113(a, d) these courts concluded that conviction and sentencing for both crimes does not constitute double jeopardy. It was by the same process that the Virginia Supreme Court decided in *Jones* v. *Commonwealth, supra,* that conviction and sentencing for robbery and use of a firearm in a felony do not constitute double jeopardy, as discussed above.

The respondent respectfully submits that the law is clear that the crime of robbery and the crime of use of a firearm in the commission of a felony are separate and distinct offenses, *a fortiori,* manslaughter and the use of a firearm in the commission of a felony are separate and distinct offenses.

CONCLUSION

For the foregoing reasons the respondent respectfully submits that this Honorable Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Thomas D. Bagwell, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 28th day of February, 1978, I mailed with first class postage prepaid a true copy of this Respondent's Brief in Opposition to Granting of Certiorari to Albert L. Fary, Jr., Esquire, 218 London Boulevard, Portsmouth, Virginia 23704, and J. Wayne Sprinkle, Esquire, 704 Professional Building, 505 Washington Street, Portsmouth, Virginia 23704.

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